NORTH AMERICAN REVIEW.

No. CCCCXXXVIII.

MAY, 1893.

THE BEHRING SEA QUESTION.

BY THE HON. B. F. TRACY, EX-SECRETARY OF THE NAVY.

THE islands of St. Paul and St. George in Behring Sea, known as the Pribyloff Islands, were transferred to the United States by Russia in 1867 as part of the Alaska purchase. These two islands are the only places inhabited by the seal in Alaskan territory. Across Behring Sea,* near the Siberian coast, and distant seven hundred and fifty miles due west from the Pribyloff Islands, is another group known as the Commander Islands, belonging to Russia, which are also inhabited by seal. No other seal-colony of any size exists in the North Pacific. The two herds inhabiting these two widely-separated groups of islands, one American, the other Russian, never mingle with each other, either on the islands which form their respective habitations, or in the adjacent waters, but each herd maintains and has always maintained its separate and distinct existence. There is no record of the killing of a seal belonging to the Commander Islands upon the isles of Pribyloff. The members of the two herds are readily distinguished by their skins, that of the American seal being of a higher quality and worth about twenty-per cent. more in the market. The difference is well established and fully recognized, although its cause has never been ascertained. It may be due to the variations of climate, to a difference in the tempera-

* So named from Vitus Bering or Behring, who discovered it in 1728.

ture of the neighboring waters, to some peculiarity in food, or to all these combined, but whatever the causes they must have operated for generations to produce the marked difference in the animals, which is conclusive evidence of the absolute separation of the two herds, and serves to identify the members of each herd beyond the possibility of question.

Why the American seal should have selected these two remote islands in the waters of Alaska for its home, *and no others*, cannot be positively stated. Delighting in fog, but unable to endure either ice or sun, the animals have doubtless been influenced in their choice by the fact that the islands are almost continously enveloped in fog from May to November; that they are free from ice during the breeding season; that a large portion of their surface is covered by ledges of smooth, bare rock, and that their shores consist of gentle slopes, giving easy access from the water, and making a beach on which the young seal can live while learning to swim. Whatever the reasons, the fact is established that these two islands are the only home of the American seal in these waters, that it has never been known to breed on any other land, and that it occupies them for about eight months each year.

The fur seal is *sui generis*. It is a warm-blooded, fur-bearing, highly-organized animal, classified by naturalists with bears, dogs, cats and other carnivorous mammals. It is essentially a land animal. It can and does at times live in the water, but it is not a fish and has none of the characteristics of the fish. Among fishes it is most nearly allied to the whale, which also belongs to the family of mammalia; but unlike the whale, which is begotten, born and reared in the water, and which perishes when removed from its native element, the seal is begotten, born and reared on the land, and but for its life on the land the species would become extinct. This period of land habitation lasts from six to eight months continuously. During this time the seals only visit the sea for short periods, for food. Some of them do not leave the island at all, even for this purpose, and if a lagoon existed, or a tank could be built that would hold enough fish to supply their wants they would not need to go to sea at all. The seal may, therefore, be accurately described as a land animal whose food is found in the sea.

The breeding season of the seal is in summer. The animals are then at their home on the islands. Here procreation takes

place. The period of gestation is between eleven and twelve months, during the second half of which the herds are at sea. The approach of its completion finds the mothers again returning to the islands ready to give birth to their young as soon as they reach their summer home. Shortly after the birth and while they are still nursing their off-spring, they again become pregnant with the young that will be born in the following season, and this process of reproduction is repeated year after year with unvarying regularity.

During the winter months the seal of the Pribyloff Islands, male and female, old and young, make an annual excursion into the North Pacific Ocean south of Behring Sea, and from this point they disperse widely to the south and east. The extent of this annual dispersion is not known, nor do we know its cause. What we do know is that it takes place each winter and lasts until the late spring. When this time arrives the scattered animals, by a natural and invariable instinct, converge from all directions, and gathering in one vast herd in the waters of the North Pacific south of the Aleutian Islands pass through the straits between those islands, and make their way together to the Pribyloffs. In this annual return of the herds to the northward, the older bulls assume the lead, and reach the islands about May 5th. As they arrive they choose their positions on the rookeries, and there await the coming of their mates. The cows, heavy with young, follow them closely, the first arriving about June 10th; and by the fifteenth of the following month the entire herd has again assembled on the islands.

In company with the well-grown bulls and cows come the younger animals, the product of the herd during the past six years. The males do not reach maturity until six or seven years of age, and these young males, together with the yearling females, take up their abode by themselves on what are known as the "hauling grounds," quite apart from the rookeries, or breeding places. None of these young males are allowed by their elders to come upon the rookeries until they are fully matured, and not even then, unless they may be able to overcome in single combat some old bull whose fighting powers have been weakened by age. They must conquer their places, and with all alike, old and young, the warfare of the rookeries means the survival of the fittest.

The young are dropped soon after the mother reaches the land, sometimes within a few hours, sometimes after one or two days. As soon as this is accomplished the mother passes immediately into heat and again becomes pregnant. For about four months after birth the young seal is nursed, receiving during this time nothing but its mother's milk, which it takes once every two or three days. All this time it remains wholly on the land. It is curious and significant that the young seal is not a natural swimmer, and that if thrown into the water on its early visits to the beach it will drown—a strong confirmation of the fact that it is by nature a land animal. When about two months old it goes down to the shore and plays in the surf, gradually learning to swim. At four months it has progressed so far that it can go in pursuit of food, but even then, and for a considerable time after, it is a clumsy swimmer.

Except the full-grown bulls, which can go without food for a long period, and the nursing young, all the seals feed in the sea during their residence on the land. Every two or three days they make a brief excursion into the waters in search of food. It is a perpetual coming and going. How far these excursions extend is not definitely known. But as the seals, after a year or two of experience, can swim easily from ten to twelve miles an hour, and as it is known that the mother seal is often away from one to two days, it is certain that they swim off as far as a hundred miles from the islands in search of food. Apart from the inherent difficulty of finding enough to sustain the life of a million animals in a zone of twenty-five to thirty miles from the islands, the fact of these long excursions is susceptible of proof. A correspondent of the *New York Herald*, writing from one of the poaching vessels last summer, states that a mother seal was killed more than a hundred miles from the islands, and her udder was found full of milk. Compelled to find food not only for themselves, but to meet the extra drain made upon them in nourishing their young, the mothers go into the sea far more frequently than the other members of the herd, and are therefore much more exposed to the attacks of poachers.

The seal rookeries on the islands of St. George and St. Paul are the largest in the world. Here the business of breeding, raising to maturity, selecting the male seals for slaughter at the age and season when the fur is of the most value ; of curing, pre-

serving, shipping and marketing the skins has been carried on for nearly ninety years. It was founded by the Russians in 1804, and was carried on by them until 1867, when the islands, together with the business, were transferred to the United States as part of the Alaskan purchase, for which the latter government paid the sum of seven million dollars. This government soon after the transfer, in the exercise of its rights as owner, assumed by an express statute the control and conduct of the business. By this statute the Secretary of the Treasury is authorized to prescribe the number, age and sex of the seals that may be slaughtered. During all this time the business has been carried on in substantially the same manner as any other successful breeding establishment. The methods in use on the Pribyloff Islands are almost identical with those of the ranchmen upon our Western plains. On the ranch the cattle roam at will, finding food where best they may until the annual round-up, when the ranchman selects from the herd those which he desires to market, retaining such as are necessary for the increase of the herd, or for continued growth and profit. At the annual round-up of the seals, which lasts from June to October, the young males of from two to five years of age which are still immature for purposes of breeding, and hence known as bachelors, are selected for slaughter. At this age, though useless for procreation, their fur has reached its highest quality, and brings the highest price in the market. During part of the months of August and September, however, the fur temporarily loses its best quality, and no seals are slaughtered.

No females are allowed to be killed on the islands. All are preserved for the increase of the herd, for it is upon the number of females that this increase mainly depends. The cow bears but one calf a year, while the bull, as a rule, serves as many as fifteen cows in a season, and may serve twenty or thirty. For keeping up the numbers of the herd, therefore, one male suffices for at least fifteen females. The killing of a single female means the cutting off of one young seal a year from the natural increase of the herd during the natural term of the mother's life. The killing of fourteen out of every fifteen males would involve no diminution whatever of the annual increase.

In selecting animals for the market, the men employed on the work go among the bachelor seals and, choosing the proper number from the great body that lie huddled together upon the

hauling-grounds, drive them to the place where they are to be slaughtered. They are killed in the open field with clubs, and the thousands of their companions in the immediate presence of whom the work is done, make no effort to escape or run away. The United States could, in this way, destroy in a single season every one of the seals on the island.

The seal industry gives employment on the islands to about one hundred men, the permanent population entirely dependent upon it for support consisting of from fifty to sixty families. To supply them with fresh meat, the Secretary of the Treasury permits the slaughter of not exceeding five thousand young seals yearly. The business thus conducted by the United States is a source of great profit. Its successful prosecution requires large capital, great energy, and skill. If the seal herds can be preserved for the next century under the conditions that existed down to 1885, it is a low estimate to place the value of these two islands at thirty millions of dollars. With the seal exterminated, they are of no value whatever.

During all these successive summers, in which, for ninety years, the business has been prosecuted, the seal has fed in the sea, and it has been permitted to come and go without let or hindrance. No substantial interference with the industry occurred prior to 1886, when a few Canadian poachers for the first time openly entered Behring Sea for the purpose of hunting the seal found in the waters surrounding the islands. This practice has continued ever since with steadily-increasing activity. The poachers respect neither age nor sex, slaughtering alike male and female, young and old. As the breeding bulls do not leave the islands, it is upon the females that this indiscriminate killing tells most heavily. The death of each mother means the extinction of three lives, her own and those of the new-born calf awaiting her return on the island, and of the unborn offspring which has only lately been conceived. Thousands of the calves die annually because their mothers are ruthlessly slaughtered while searching for food that is to give them strength to nurse their young. It is a yearly-recurring massacre of mothers and their little ones, for the commercial profit of the poachers, and it is rendered tenfold more fatal to seal life by the method in which it is pursued. For it must be remembered that these seals are killed not by clubbing, or harpooning, or catching with a

hook, but by the simple process of shooting them as they are seen at the surface of the water. Hence vast numbers of those shot are lost, and the number taken represents but a small part of the number killed. The enormous destruction of seal life that results from this barbarous and reckless practice can only be guessed at. If the number taken by the poachers can reach over twenty-eight thousand, as it did in 1891, what must be the number of those that were killed and left behind? It is said that they lose five out of every six shot. The depredations of 1886 and the following years reduced the number allowed by the lease to be killed on the island from a hundred thousand to sixty thousand, and of this number only twenty-one thousand could be killed in 1890. Already we are advised that sixty-seven vessels are ready to engage in their unlawful work during the coming season, as against forty-nine last year. Unless this poaching can be suppressed the extermination of the seal at an early date is certain.

It is obvious that the United States has an immense interest at stake in the future of the fur seal. It is obvious, also, that the preservation of the species is an interest in which not only the United States, but all mankind, are directly concerned. But the question we are now considering is not one of interest; it is solely a question of right, and it should be approached impartially with the single object of determining with certainty what are the rights of the parties in the matter. The questions to be considered, are:

First—What right of property has the United States in the fur seal of the Alaskan Islands?

Secondly: In what way and to what extent can this property right be protected and enforced.

There can be no question that the seals while on the Pribyloff Islands are the property of the United States. The law of nature fixes an inchoate property in all animals *ferœ naturæ* in the owner of the territories where they are found. The right is said to exist *ratione soli*—the owner of the soil is the owner of the animal. This principle found expression in the Roman law, which, although it held in general that wild beasts are the property of the taker, allowed no man to hunt upon another's ground, except by consent of the owner of the soil. It found similar expression in the Danish law of England, which was traced directly

to the Scandinavian law of the Continent, and which gave to the owner of the land the exclusive right to take wild animals thereon. The same rule was adopted in the Saxon laws that preceded the Conquest, and such would appear likewise to have been the doctrine of the common law.

We have spoken of this as an inchoate right because, although it was exclusive enough on the territory, the nomadic habits of wild animals gave it a merely transitory character, unless, in some way, the ownership was asserted. An animal that wandered hither and thither, having no fixed connection with the locality, now on one man's land and now on that of another, equally incapable of identification on either, could only be said to be owned at the moment when it was caught and killed, for its ownership depended upon the place where at this moment it happened to be. Some further element was necessary to vest a complete title to the animals while still living, and to separate either in principle or in fact the wild beasts which roamed at large in the forest from those which the proprietor of the land could claim as the subject of a fixed and well-defined property right.

This additional element was found in the idea of reduction to possession, which, when united to the inchoate right vested, *ratione soli*, in the proprietor of the land, gave a complete title. The reduction to possession took an infinite variety of forms. It might arise from the grant of the sovereign, from the act of the lord of the soil, or finally from the act of nature. Thus under the game laws so long in force in England, the crown granted to individuals certain franchises or rights of hunting known under the name of chase, park, free warren, etc. Here it was the act of the sovereign. Again, it might arise from a man's own act, as by making an inclosure and confining the animals within it, as deer in a park, pheasants or partridges in a mew, or hares or rabbits in a warren; or by employing keepers, to whom the animals were a direct and peculiar charge. In fact, actual confinement, by an inclosure, or otherwise, was not necessary to establish this reduction to possession, by which ownership was rendered complete. Thus doves or pigeons, living in a dovecote on the land, were held to be reduced to possession, although free to go and come and to fly hither and thither as they pleased. In this case mere residence or having an abode on the land was a sufficient reduction to possession. In the same way bees, although

rightly classed by jurists as animals *feræ naturæ* have for hundreds of years been regarded as the property of him upon whose land they are hived, to be sold and transferred by delivery like the horse or the ox; and this, solely because their home is fixed upon his territory. The bees, like the doves and pigeons, are free to wander in search of flowers to feed on, but are none the less reduced to possession, so as to be, to the fullest extent, the subject of property. The same may be said of the hawks, formerly used in the sport of falconry.

In determining what constituted possession, the law in many cases gave effect to what was, in reality, little more than a bare assertion of ownership. As in the case of the deer, mentioned by Blackstone, "that is chased out of my park or forest and instantly pursued by the keeper or forester," these remain "still in my possession, and I still preserve my qualified property in them." In some cases the act of reduction was merely symbolical, as by putting on a mark, like the delivery of a twig or a clod of earth which constituted livery of seisin or possession at common law. Thus Blackstone says:

> "If a deer, or any wild animal reclaimed, hath a collar or other mark put upon him, and goes and returns at his pleasure; or if a wild swan is taken and marked and turned loose in the river, the owner's property in him still continues, and it is not lawful for any one else to take him."

So far have the courts carried the principle of what may be called constructive reduction to possession that, in a case cited by Chitty, an action was maintained against one who by firing guns near the decoy-pond of another, frightened away the wild fowl resorting there. In this case the wild fowl, for whose loss the owner of the land could sue, had not been captured; they had not even been brought within the actual power of the plaintiff. They were merely in such a situation that their actions indicated that they might or would, if not interfered with, come eventually into his power; and this bare potential possession was sufficient to enable him to maintain an action.

But the law does not stop with the acts of the sovereign or of the private land-owner. It infers a reduction to possession from the unaided act of nature. Thus in the case of animals, however wild, the law gave the owner of the soil a clear property title to the young born thereon until such time as they were able to fly or run away. It was not necessary to capture them, or in any way to

lay hands upon them. *It was enough that the owner could capture them if he desired.* The law looked not to actual possession, but to the power of reducing to possession at will. Upon similar principles the Supreme Court of the State of New York has held that bodily seizure is not requisite, but it is sufficient that the animal should be brought within the certain control of the party.

Nor is it necessary, in cases where the reduction to possession is brought about by the unaided act of nature, that the animal should lose his freedom of movement, or that his going and coming should be restricted any more than it is in cases where possession arises from the intervention of man. If a colony of bees swarm upon a hollow tree on my land, making its home therein, the law without question recognizes those bees as my property. No barriers encircle them; they are free to go and come as they choose. I have done nothing to restrain them; I have not even done aught to invite them. Yet they are as completely mine as if I had built a hive for them. They found on my land a congenial dwelling which nature placed there, and by taking up their abode therein they have reduced themselves to my possession and thus become my property by their own act.

The principle that a reduction to possession, with all its attendant consequences, may be established by the acquisition through the animal's voluntary act of a home on the land, has received a clear enunciation from the highest English authorities. In a masterly opinion delivered in the Court of Exchequer (Blades v. Higgs, 13 C. B. 850) Baron Wilde says:

"It has been argued that an animal *feræ naturæ* could not be the subject of individual property. But this is not so; for the common law affirms a right of property in animals even though they were *feræ naturæ*, if they were restrained either *by habit* or inclosure within the lands of the owner. We have the authority of Lord Coke's reports for this right in respect to wild animals, such as hawks, deer, and game, if reclaimed, or swans or fish, if kept in a private moat or pond, or doves in a dove-cote.

"The principle of the common law seems, therefore, to be a very reasonable one; for, in cases where either *their own induced habits*, or the confinement imposed by man, *have brought about, in the existence of wild animals, the character of fixed abode in a particular locality*, the law does not refuse to recognize in the owner of the land which sustained them a property co-extensive with that state of things."

Having established this clear principle that the inchoate right to wild animals, however wild they may be, vests in the owner of the land on which they are found *ratione soli*, and that the re-

duction to possession completes and perfects this title, how does the principle apply to the case of the seal? Although doubtless to be classed, like the bees, as animals *ferœ naturæ*, the wildness of the seal is by no means that of a beast of prey that roams in the forest. In the strict sense a wild animal is one that fears man and instinctively seeks to escape from his presence. But the seal is born tame. On the land he is docile and helpless, having neither the desire nor the ability to escape from the control of man. It might well be claimed that with an animal having such a disposition no formal reduction to possession is necessary. But assuming that it is, the conditions surrounding the life of the animals upon the Pribyloff Islands are such as to establish it in the amplest manner, both by the act of nature and by the act of man. In the first place the seal is begotten and born upon the islands, and during the first four months of its life, while it is being reared, it cannot get away. Possession at this time exists in the strictest sense of the term, and may be said to vest a complete title. But, apart from the case of the young seal, the condition of the whole herd, young and old alike, is such that they are substantially as much reduced to possession as domestic animals. The islands are their home, their fixed place of abode, which they inhabit during the greater part of the year, and to which they have always returned during a period whereof the memory of man runneth not to the contrary. They live and abide there, as the bees and the doves, however much they may wander, live and abide upon the land to which they always return from their flights. It matters not that this abode has been selected by the animal's unaided instinct, and that it is maintained by his voluntary habits. We are told, and truly, that the adoption of a fixed abode, although the result of mere habit, constitutes such a reduction to possession as to establish firmly a property right. We have seen a complete illustration of this principle in the case of the bees, which, having swarmed on a tree on a man's land, become *ipso facto* his property. And this adoption of an abode is not a novel and recent movement of the present generation of seals, not the sudden impulse or caprice of the moment, but the act of ancient progenitors, repeated year after year by their descendants, from the first time that their habits were observed and recorded. It has been their ancestral home from time immemorial.

It must be noted also that this is the only abode of the seal. They never take up even a temporary residence in the territory of another. If they did it could hardly be regarded as a home, when compared with the Pribyloffs, the seat of reproduction, the birthplace of the race; but they do not. During the summer the mothers and the half-grown seal leave the islands only for short excursions to obtain food. The adult bulls and the pups do not leave them at all. In the winter the herds go out into the ocean, which is no man's territory. There is no other land, domestic or foreign, which the seal visit even for purposes of casual sojourn; much less is there any which can set up a rival claim as their fixed abode.

But it is not alone by the act of nature that the seal on the Pribyloffs have been reduced to possession. While here they are in the direct charge and under the certain control of the keepers on the islands. The control of these keepers, and through them, of the proprietor of the soil, is complete. No one would deny that if the herd were walled up in an inclosure, or if the animals were tied individually with rope, they would be reduced to possession. But so restricted are their powers of locomotion that, if these measures were adopted, control would not thereby be rendered more perfect. When driven by their keepers they move slowly and with painful effort. In comparative facility of capture the bee and the dove are as illusive as quicksilver. To have a herd of animals under your certain power and control it is not necessary to tie them up, when their greatest possible power of movement will carry them only one step to your ten, and when they are so tame that at your approach not one among the thousands moves from his place until you drive him away by force. This is no mere constructive reduction to possession, but a certain, actual and efficient reduction to possession.

The question what shall constitute property in wild animals within the territory has so far been considered solely as it arises between individuals, — that is to say, between the individual owners of different parcels of land upon which such animals may be found, or between one individual land-owner and the captor of the animals. But the question takes a much broader scope when considered as a question between state and state. What shall constitute ownership within the territory of a state as against another state? Is any reduction to possession necessary to com-

plete the property right of the state within its territory? And, if so, what constitutes a reduction to possession? This question is one which it is entirely competent for every sovereign to decide upon his own territory, and within his own jurisdiction. The property of the sovereign in wild animals within the territory has been repeatedly recognized and has found frequent expression in legislation. Thus the English game laws, which were adopted after the Conquest, held that all animals of chase, and such as were accounted game, belonged to the king, who granted the right to take them to such of his subjects as he might choose. The right of the sovereign to vest in individuals a title to wild animals is affirmed with distinctness by Baron Wilde, of the Court of Exchequer, in the English case quoted above. In commenting unfavorably upon certain decisions of English courts, which showed a departure from the original doctrine of the common law, he says: "If the *legislature* should interfere by giving to the owner of land a property in game, either absolute or qualified, as long as it remained on his land, it would only be acting in the spirit and policy of the common law." In fact, the examples of this exercise of the sovereign power both in England and the United States are numerous. Thus the Legislature of the State of New York has enlarged the power of acquiring a title to game by pursuit, in the case of deer in the counties of Suffolk and Queens, by declaring that any person that starts a pursuit of such game shall be deemed in possession of the same so long as he continues in fresh pursuit thereof. Nothing could be a clearer assertion of the right of the sovereign to declare what acts in the nature of a reduction to possession may be necessary in order that the title may vest.

Now, the property right in the seal is claimed not by the owner of the soil alone, in virtue of his ownership, nor by the sovereign of the territory alone, in virtue of his eminent domain. It is claimed by him who is at the same time owner and sovereign. The two titles meet in the United States. The United States, as sovereign of the territory, has reduced to possession the wild animals on its domain. The United States, as owner of the soil, has reduced to possession the wild animals on the land which it holds in fee. Can anything further be wanted to establish its title to these animals on the islands?

Although it might seem under these circumstances that no declaration or enactment would be necessary on the part of the

sovereign to establish his title, yet this is not wanting. Not only have the seal been reduced to possession and so clothed with the character of property, by the act of nature, and the act of man, but they have been expressly declared by the sovereign power to be its property. The Russian Government, the original proprietor of the seal, affirmed distinctly its rights of ownership, founded thereon a charter to a particular company, and prohibited to all other parties the exercise of such rights as ownership implies. The United States succeeded by purchase to the right of the Russian Government, and, lest there should be any misconception upon the point, it confirmed the declaration of its predecessor by an express statute. This statute, passed July 27, 1868, provides that "no person shall kill any otter, mink, marten, sable or *fur seal*, or other fur-bearing animal within the limits of Alaska territory, or in the waters thereof."

By the act of July 1, 1870 [*Rev. Stat. Sec.* 1960], it is provided that it shall be unlawful to kill any fur seal upon the islands of St. George and St. Paul, or in the waters adjacent thereto, except during the months of June, July, September and October in each year; and it shall be unlawful to kill such seals at any time by the use of fire arms, or by other means tending to drive the seals away from those islands; but the keepers on the islands are allowed the privilege of killing such seals as may be necessary for their own food, clothing and boats. It is also [*Sec.* 1961] made unlawful to kill any female seal, or any seal less than one year old, at any season of the year, in the waters adjacent to the islands, and the penalties of fine and imprisonment and forfeiture of vessels and cargoes are imposed for violation of the act.

The statute proceeds [*Sec.* 1962] to limit the number of seals to be killed for their skins upon the islands to 100,000 per annum for a period of twenty years, and empowers the Secretary of the Treasury to reduce the limit, if it become necessary for the preservation of the seals; to make leases of the right of taking fur seals on the islands; and, finally (*Sec.* 1967), every person who kills any fur seal on either of these islands, or in the waters adjacent thereto, without the authority of the lessees thereof, or who molests, disturbs or interferes with the lessees in the lawful prosecution of their business shall be subject to fine and imprisonment, and a forfeiture of their vessels and cargoes.

In pursuance of these statutes, the United States has granted

by successive leases the right of taking seal from the islands; and it has thus in every possible way asserted and confirmed by acts and by express declarations the property right which it acquired in the Pribyloff seal when it became the proprietor of the islands upon which they dwell.

Having established the property right in the seal while on the land, the question is: When the animals leave the islands how far does this ownership continue? Upon this point a clear exposition of the law has been given by Blackstone, the greatest English authority upon the common law. Speaking of animals *feræ naturæ*, which, like the seal have once been reduced to possession, he says:

> "These are no longer the property of man than while they continue in his keeping or actual possession; but if at any time they regain their natural liberty his property instantly ceases; *unless they have animum revertendi, which is to be known only by their usual custom of returning.* The law therefore extends this proposition *further than to the mere manual occupation.*"

Upon this principle it is clear that even an animal *feræ naturæ* may leave the immediate keeping or possession of his owner, and the land which is his permanent abiding place, and if he has the intention of returning, as shown by his usual custom, his owner's title to him remains unchanged, and may be asserted against others who seek to capture him. Such a capture is unlawful, and the property may be reclaimed from the captor wherever it can be identified. If my bees, which, be it remembered, are *feræ naturæ*, fly into my neighbor's orchard, and feed there, intending to return, he has no right to treat them as his own. My neighbor has no more title to them than he has to my horse or my ox that is found trespassing upon his land. Still less can capture be justified or a title by capture be asserted where the bees fly into the highway, which is for the common use of all. As with the bees, so with hawks and doves. It is not necessary to my ownership that I should restrain their freedom of movement, a freedom which from the habits of the animal is indispensable to their existence; it is not necessary that I should pursue them in their daily excursions, for their movements are in accordance with their nature, and I know they will return. The *animus revertendi* continues my possession, and preserves my

title; and I can maintain this title whenever and wherever I can identify my property. It makes no difference whether the intention to return springs from instinct, as in the case of the bee, or from partial domestication, as in the case of the dove. A carrier pigeon, thrown up five hundred miles away from its home, does not become the property of any person who may capture it during the course of its homeward flight; although liberated it is not abandoned. The owner has set it free knowing that its instinct would with unerring certainty lead it home again. The bird is doing the work for which nature has intended it, and no one would have the right to capture it, or to interfere with its movements.

Such being the principle of law in reference to animals that are compelled by their nature and habits to make excursions from their home, how does it apply to the case of the seal? Like the bees, they are wild animals, but like the bees, also, they are the subject of property. While on the Pribyloff Islands they are unquestionably the property of the United States. These islands have been for ages their fixed place of abode, where generation after generation has been begotten, born and reared, where the greater part of each year has been spent, and to which all have returned season after season with unbroken uniformity. Upon these islands they are under the complete and effective control and possession of their keepers. Their owner does not confine them there, any more than the owner of the bees, or the hawks, or the doves, because in the one case, as in the other, confinement is neither desirable nor necessary. It is not desirable because in all these cases the animal's habits and mode of life require freedom of movement. It is unnecessary because, when the seals journey forth, they are sure to come back. When they leave, they leave with the fixed intention of returning. Does anyone suppose that the mother which has gone out for food, that she may nurse her young, will forget her maternal instinct and wander off, leaving her little one to die of starvation? Is there any possibility that she will fail to return, unless indeed she falls a victim to the poachers, who have formed a cordon about the islands that they may steal her skin?

Even in the annual migration, when all the seals depart and are absent for four or five months, they have the same intention of returning, of which the best evidence is their actual return year after year for more than a hundred years, when the proper

season comes. And upon this migration, it is not to another home that they resort. They land upon no foreign territory, even temporarily. Like the bees, that fly into the highway, their wanderings are in the open ocean, the highway of all nations. Like the bees also they go with the intention of returning. Wherever the Alaskan seal may wander from his home, the *animus revertendi* is always present with him.

We need go no further than to ask that the strict principle of the common law be applied in the case of the seal as in that of other animals. We have seen how such animals are regarded when they go out for food or for any other object. The birds and the bees are the private property of individuals, and while their home is upon the land they may, and in fact do, live for a large part of the time in the air. Does not the same right of property exist in a land animal that lives and fixes its home upon the owner's soil, but hunts its food in the water? Is the freedom of the sea less than the freedom of the air? "The hawk that chases his quarry," says Blackstone, "remains mine wherever he flies, because he is sure to return." My seal, leaving my land to chase his quarry, is not less mine than the hawk, since it is equally certain that he will return.

Nor will it be denied, in the face of the well-established doctrine of law, which has been quoted above, that if a mark were put upon each seal it would, like the wild swan, continue "the owner's property," and it would be unlawful for anyone else to take the animal, as long as the owner can reclaim it. But here again nature has done the work for man. No brand is needed to identify the seal of the Pribyloff Islands, nor would any "collar or other mark" fix more distinctly his membership in the American herd, or his home on the American islands, than these have been already fixed by his skin, and by the fact that his movements are confined during fixed times to fixed localities which no other animals of the same species frequent. No seal but the seal of the Pribyloff makes its way up through the Aleutian passes in the spring; no other fills the waters in the hundred-mile zone about the islands during the summer, and no other again passes down through the straits in the autumn.

Lord Salisbury has undertaken to dispute the property right of the United States in the seal, on the ground that such a right cannot be acquired in wild animals unless they are actually the

subject of capture. He states his theory in his letter of May 22, 1890, in the following terms :

> "Fur seals are undisputably animals *ferœ naturœ*, and these have been universally regarded by jurists as *res nullius*, until they are caught; no person, therefore, can have property in them until he has actually reduced them to possession by capture."

This sweeping dictum of Lord Salisbury fails entirely to take account of the simple and clear distinctions of the common law, as well as of the character and habits of the animal whose relations he is discussing. It is in direct contradiction not only of reason but of authority and example. By making capture the sole and exclusive test of property in animals *ferœ naturœ* it would do away with the title of the United States to the seal upon its own land, until each seal had been tied with a rope or knocked on the head with a club. Even the rights of property as between individuals are not to be governed by such a rule, much less the rights arising between nation and nation. And it must be remembered that the present question is of the latter kind. The sovereign is under no necessity, in order to create title to wild animals on his land, of reducing them to possession by capture even when they are nomadic and predatory in their habits, and only temporarily therein. Still less is his title dependent upon capture when they have a fixed habitation on his land. They need no reduction to possession, for they are reduced to possession already.

Could any formal act of capture put the seal on the Pribyloffs more completely under the possession of the United States than they are to-day ? Does it make any difference in their condition that this possession results from the voluntary act of the animals themselves ? An animal that has walked into an inclosure of its own accord is no less captured than an animal which has been driven in by main force. A capture is none the less a capture because it takes the form of a voluntary surrender.

Nor does it make any difference that this water-locked territory upon which the animals have thus voluntarily put themselves in the power of their keepers was formed for its purpose by nature. It is an inherent element in the value of the property which the United States acquired by purchase, that it has such natural advantages as a refuge for the seal that it could not, in

this respect, be improved by the art of man. It is one of the attributes and incidents of our property, to the benefits of which we are as much entitled as if we had ourselves constructed the shelving beaches, the rookeries filled with smooth rocks, and the hauling grounds where the young seal are herded. If I make a trap for any kind of untamed beast or bird, and put therein objects that will attract them, and they fall into it, they are mine even by Lord Salisbury's ruling. Are they any the less mine if nature has constructed a trap upon my own ground, and provided it with sources of attraction? Nobody can deny that the Pribyloff group is as perfect a means of reducing the seal to possession by capture as any which the hand of man could have constructed. In fact it is far more perfect, and the proof of it lies in the fact that each year the seal returns to be taken, with never-failing persistency, and that at any time during any summer its owners could, without an effort, annihilate the herd,—not only as it exists to-day, but for all future time.

It may be said in passing that this annihilation of the seal herd is not only possible, but may become necessary, should any such theory as that of Lord Salisbury be applied to the Alaskan seal, and thereby serve to defeat the right of the United States to protect its property. If it becomes a question between the extinction of the herd for the benefit of its owners, and the extinction of the herd for the benefit of foreign poachers, the United States will have no choice but to adopt the former alternative. It certainly does not propose to protect seal life simply in order that poachers may do all the killing, and it cannot be expected to debar itself and its citizens from a legitimate means of support arising within its own jurisdiction, upon considerations of the general welfare, when the predatory acts of others, in defiance of all such considerations, are cutting off the source of this revenue and appropriating the proceeds to themselves.

The adoption of Lord Salisbury's theory can hardly fail, therefore, to lead to the extinction of the species. It is probable, however, that Lord Salisbury did not intend to apply his principle to the ownership of wild animals on the territory, although he states it broadly and without any limitations.

The forms of animal life to which, and to which alone, the doctrine really applies, are those of fish in the sea, of migratory birds in the air, and of such nomadic wild animals on land as

wander from one state to another. These have no fixed habitation. Such of them as seek out a temporary resting place and sojourn there for limited periods lose their identity the moment they leave it. In some rare cases it is possible that animals may return at intervals to these favorite places of sojourn, but if they do there is no way by which the fact can be established, or by which those following such a practice can be distinguished from the great body of migratory animals of the same species. With all such, therefore, when outside of the jurisdiction of any particular nation, capture is the general test of ownership.

The Alaskan seal cannot be confounded with the animals above described. It resembles them in no respect. Until the herd separates, south of the Aleutian Islands, it never loses its identity, and it retains always its territorial domicile. When it leaves the Alaskan Islands, it goes only into the ocean. It goes with the intention of returning, and this intention it has carried out year after year as far back as its history is known. It is in this intention of returning that lies, according to Blackstone, the essence of continuing ownership after the animal has left the territory of its owner. It obviates the necessity of capture, or, rather, it is in itself a capture. Lord Salisbury would not dispute the position that a fish on a hook at the end of a line was the qualified property of the owner of the line, even though the line were as long as the trans-Atlantic cable, and though the ultimate landing of the fish might be subject to many chances and uncertainties. The *animus revertendi,* recurring year after year in the same manner with unchanging regularity, as it has recurred for an indefinite period in the past, is a force less resistible than that which operates through hook and line, and gives a greater certainty of ultimate capture.

It having been shown that the United States has a property in the seal, not only on land but in the sea, the second question that arises is: In what way, and to what extent can this property right be protected and enforced?

Here again we may take the law from the great commentator whom we have previously quoted:

"In reference to animals *feræ naturæ*," he says, "while they thus continue my qualified or defeasible property, they are as much under the protection of the law as if they were absolutely and indefeasibly mine, and an action will lie against any man that detains them from me or unlawfully

destroys them. It is also as much felony by common law to steal such of them as are fit for food as it is to steal tame animals, but not so if they are only kept for pleasure, curiosity, or whim, as dogs, bears, cats, apes, parrots, and singing birds, because their value is not intrinsic, but depending only on the caprice of the owner, though it is such an invasion of property as may amount to a civil injury and be redressed by a civil action.'

Although this distinction between animals having an intrinsic value and those kept merely as pets has passed away in recent times, yet even by Blackstone's standard of intrinsic value the taking of a seal in which another had a property right would have amounted to felony.

The property right of the United States in the seal rests upon the broad principle than an animal, even *ferœ naturæ*, which has once been reduced to possession, and which leaves its home with the intention of returning, retains its character of property and may be reclaimed by its owner wherever it can be identified. Whether international law affords a process by which this right could be enforced within the jurisdiction of another party, it is not necessary to consider, for the seal are not found within the jurisdiction of another. They go only into the sea; and the sea is nothing more than a great common or waste—the property of no man, but which all alike are free to use. It is in this great unoccupied and unowned territory that the seals which are our property and have their home upon our land can alone find a means of sustenance. Shall they be debarred from its use by the predatory acts of another?

The right which I possess of feeding my animals in the sea is in the ordinary nature of a usufruct; a right to enjoy the benefits of property that is not one's own. The United States does not own the sea, for the sea is no man's property, but it claims a usufruct in the sea, at least as great as that of every other nation. If a stream of water flows through my land, I do not own the water, but I am entitled to the usufruct of the water. I cannot divert the stream from its bed, which would inflict damage upon another, but I can use it for domestic purposes, and can cause my cattle to be watered in it, and I can employ its current to obtain power to turn my mill. So when I have an animal that is my undoubted property, and whose nature requires that at certain periods it shall use the sea to obtain its necessary sustenance, I can claim for that animal so situated that in its enjoyment of the sea, or what is the same thing, in my lawful enjoyment of it

by feeding my animal therein, I shall not be interrupted or injured by others.

Suppose that the fur seal lived on the Pribyloff Islands during the whole year instead of during eight months; would anybody claim that in making their brief diurnal or weekly excursion in pursuit of food they had not the right to obtain their food without molestation? If my ducks are found in the water, in search of fish or other food, can anyone take them? If my dog or my horse should swim out to sea, or being on a wrecked vessel should swim to shore, anyone who injured or molested him in the water would be answerable to me for the damage he had done, and my right to indemnity would be the same, even though the wrong-doer were a foreign subject, and the wrong done was done outside the three-mile limit. In the same way, when my seal has swum out into the water to obtain food in obedience to a natural instinct, I can claim that he shall not be injured, or molested, during his brief absence from the only place which he knows as home. Being my property upon the land, he is mine also when in the sea. The title does not shift every time he goes into and returns from it.

The right to prevent such an injury as between state and state has nothing to do with the limitations of maritime jurisdiction. It depends upon a law of far greater force and higher origin than any doctrine of territorial jurisdiction—the law of self-preservation. The right of self-preservation is the highest right known to man. In an individual it is synonymous with the right of existence; in a nation it is a right to preserve and protect its property and the lives and property of its citizens wherever they may be.

This right of protecting the seal is no question of closed seas or open seas; of free navigation, or obstructed navigation. The sea is no one's property—the open highway of every nation, whose ships may freely navigate it for the purpose of lawful trade. The United States does not claim to obstruct such navigation, in waters either within or outside its territorial jurisdiction. It does not assert that Behring Sea or any other part of the ocean is a closed sea, for any lawful purpose, but it does assert that the privilege of free navigation which it admits is the legal privilege of all cannot be made to cover and shield a felonious attack upon its property, whether at sea or on land, or to prevent it from taking such measures as are necessary to see that this property shall be protected.

Nor is this any question of free or restricted rights of fishery. It may be conceded that the right to take fish in the open sea is a right that belongs equally to all nations, as much as the right of navigation. But the right to take fish, which is conceded, has nothing in common, either in fact or in principle, with the killing of seals. As a matter of fact, the seal is not a fish any more than a duck is a fish; it has none of the characteristics of the fish except the power of swimming, which it possesses in common with many other land animals, both wild and domestic, but which, owing to the fact that its food cannot be found on land, it uses in a greater degree. As a matter of principle, the seal whose home is on the land and whose property relations are clearly ascertainable, cannot be compared with the fish, which has no home; which is not connected with the territory of any state; which, if it were so connected, could not be identified when once in the ocean; and which wanders hither and thither unattached and unattachable until actually captured by the hand of man. The seal of Alaska has, by its natural habits, reduced itself to possession. The fish, by its natural habits, preserves forever the quality of freedom that belongs to the element in which it makes its home.

The right of the United States to the free enjoyment and use of the sea for its seals derives an additional support from prescription. The claim to the exclusive ownership of the fur seal in Alaskan waters was made by Russia, and upon that exclusive claim a company was chartered, and a business was founded which was openly prosecuted for more than half a century, and to which the United States succeeded by purchase. Whether foreign states acquiesced or not in *other claims* made or supposed to have been made by Russia, such as the exclusive right of navigation on the northwest coast, it cannot be pretended that her right to the seal and her right to conduct the exclusive business of breeding, rearing and slaughtering the seal for their fur, which business was transferred to the United States in 1867, was ever denied or even questioned by any nation up to the time of the present controversy. For more than a hundred years the herd of seals inhabiting the Pribyloff Islands has been treated as the sole property of Russia and her successor, the United States, and for nearly ninety years the business has been carried on precisely as it is carried on to-day without a word of protest or dissent.

This additional support of prescription reinforces and strengthens not only the right to carry on the business of taking seal on the islands, but also the right to the use of the sea by the seal for purposes of feeding. This has already been described as in the nature of a usufruct. A usufruct may and often does add materially to the value of real property; in fact, property may exist which is of great value when coupled with a usufruct, but which without it is entirely worthless. It is upon prescription that this species of property more frequently depends, and in the present instance, by confirming the right derived from general principles, it gives a double force to our title to the usufructuary enjoyment of the sea. If the consent of nations were required for the exercise of so clear a right, this consent could rightly be presumed from long acquiescence. The United States therefore finds itself at the present time in a situation that may be described as follows:

The Alaskan seal, in which wherever it can identify them it has an undoubted property right, not only on the islands but when they leave their home with the intention of returning, and when they are enjoying that use of the sea to which all nations alike are entitled, is attacked by marauders, and is in danger of extermination. The United States seeks peaceably and by negotiation to obtain from the government, to whose subjects these marauding vessels belong, such measures of restraint as may prevent these depredations, or, by reducing them, avert their fatal consequences. After several years of fruitless negotiations it finds that, so far from securing a reduction of these depredations, they are greatly on the increase, and to such an extent that its property is threatened with total destruction. Under these circumstances it has a clear and indisputable right to take the protection of its property into its own hands.

Such a course must, however, be confined within the strict limits of the existing property right. These limits, owing to the nature of the seal, are susceptible of easy definition. As we have seen, the owner of wild animals, which stray with the intention of returning, may assert his rights and claim his property, as long as the property can be identified. A waif or stray which bears about it no mark of identification by which the owner can be known is the property of the taker. So it is with the seal.

It is this capacity for identification which fixes the limit

within which the restrictive powers of the United States are operative. When the herd passes out into the broad spaces of the Pacific and disperses hither and thither, no man knows where, mingling, perhaps, with the seal of the Russian islands, perhaps keeping up a separate existence, this country would have no foundation for a complaint against him who kills or captures them. It has no right to protect them, because, under these conditions, it has no means of identifying them, nor would it attempt to assert a right to protect them. But as the spring wears on,—as the mothers feel that their time is drawing near, and seek the land which alone they know as home, and as the remainder of the herd, drawn likewise by an uncontrollable and habitual instinct, concentrate in one vast body preparatory to making their way through the passes of the Aleutian Islands, the identity of the property becomes reëstablished beyond the possibility of a doubt, and the right of the United States to protect them revives in all its original vigor. This identity remains fixed, and this right continues during the period of island residence, and until the annual separation for the winter.

So invariable are the habits of the seal that it is easy to fix both the limit of time and place within which this identification may be made. The assembling of the herd takes place in May of each year in the waters directly to the southward and in the immediate neighborhood of the Aleutian peninsula and islands. The dispersion takes place with equal regularity during the month of November and in the same locality. It is during the period between the annual round-up and the annual separation that the rights of the United States may be asserted and maintained.

Having considered the legal aspect of the question, it only remains to touch upon its moral aspect, to which certain important references have been made in the course of the diplomatic correspondence.

In the letter of January 22, 1890, in which Mr. Blaine first treated in extenso of the grounds upon which the United States were proceeding, reference is made to the fact that the seal poaching, as pursued by Canadian vessels in Behring Sea, is *contra bonos mores,* an act which is in itself immoral. A general statement has already been made of the grounds of this opinion, in describing the habits of the seal, and the effect continued poaching must have upon the future existence of the species.

There are few who will deny the justice of the assertion that any pursuit which must inevitably result in the total destruction of an animal of such valuable qualities to mankind as the fur seal is an evil which should be prevented, if possible—an evil in and of itself, the encouragement of which is, from the nature of things, immoral.

Not only, however, is the general injury and loss to mankind that would result from the destruction of seal life to be considered, but the barbarity and wantonness of the methods by which this destruction is accomplished.

The methods are, in the first place, barbarous, because they consist in the slaughter of the mother seals at a critical moment of their existence, a moment when the sentiment of the whole world, civilized and uncivilized, is alike in agreeing that the mother should be protected,—a sentiment which finds expression not only in the dicta of moralists but in the game laws of every country in the world. In all these expressions of moral law, whether found in ethical writings or in statute books, the pregnant mother and the nursing mother are surrounded with an inviolability—it might almost be said a sanctity—which preserves and protects them. But the mothers whom the poacher destroys are not pregnant mothers alone, or nursing mothers alone, but they are both at the same time, and upon their life hangs the life both of the offspring that is and of that which is to be.

The methods are in the second place wanton, because the number of seals taken bears no proportion to the number killed. Suppose that the poachers get one in six of all that they shoot. Their catch last year amounted to 28,000, representing a direct slaughter of 168,000, to say nothing of the indirect slaughter of the young just born, of the young then in their mother's womb, and of the progeny to which, had they lived, the cows would to a certainty have given birth in the succeeding years. It is a small estimate to place the destruction thus directly and indirectly accomplished in a single season at considerably more than a quarter of a million of animals, nine-tenths of which is of absolutely no benefit to the destroyers. It is well known that other herds of seal equally numerous, which formerly existed in other localities, have by reckless hunting been entirely wiped out of existence, and it is beyond a doubt that the same fate will shortly overtake the last great herd that survives if the present practice is to con-

tinue. Can it be denied that such a pursuit, having such consequences to mankind at large, and carried on with the circumstances of barbarity and wastefulness that have been described above, is *contra bonos mores*, a thing immoral in itself, and to be condemned by the unanimous sentiment of the civilized world?

With regard to this argument Lord Salisbury says: "It is obvious that two questions are involved: First, whether the pursuit and killing of fur seals in certain parts of the open sea is, from the point of view of international morality, an offense *contra bonos mores;* and, secondly, whether if such be the case this fact justifies the seizure on the high seas and subsequent confiscation in time of peace of the private vessels of a friendly nation."

The first of these questions has been already considered. It is thus answered by Lord Salisbury:

"Her Majesty's Government must question whether this pursuit can of itself be regarded as *contra bonos mores*, unless and until, for special reasons, *it has been agreed by international arrangement* to forbid it. Fur-seals are indisputably animals *ferœ naturœ*, and these have universally been regarded by jurists as *res nullius* until they are caught; no person, therefore, can have property in them until he has actually reduced them into possession by capture.

"It requires something more than a mere declaration that the Government of citizens of the United States, or even of other countries interested in the seal trade, are losers by a certain course of proceeding, to render that course an immoral one."

It would seem that Lord Salisbury fails to recognize the ancient and well-known distinction between a thing which is *malum in se*, and things which are merely *mala prohibita*. According to his view seal-poaching is not to be considered as immoral at all unless and until the nations of the world have agreed to prohibit it. He forgets that there are some acts which are immoral, independently of any prohibition; whose immorality is derived not from their being prohibited, but from the bad quality inherent in themselves. Some acts are vicious only because they are forbidden by municipal law or by the consent of nations, which forms international law. Other acts are vicious, because they are prohibited by a higher law—a law of nature; and in that case they must be characterized as *mala in se* and as *contra bonos mores* independent of any statute or international agreement. As to the character of an act in itself immoral, neither international nor municipal law can enlarge or diminish the condemnation pronounced by the law of nature. An act that is inherently

wicked requires no legislation or agreement to make it so. Of such a character are the depredations of the seal poachers.

It may be doubted, however, whether Lord Salisbury really meant what he said when he questioned whether a practice could be regarded as *contra bonos mores* until it had been agreed by international arrangement to forbid it. His probable intention was, assuming that seal poaching was immoral, to question what right the United States had to prevent even an immoral practice by the capture of British vessels on the high seas. This it will be observed is an objection quite different from the other, but it is at least reasonable. It is not, however, a difficult question to answer.

The United States does not claim the right to act as the champion of morality among the nations of the earth, and to put down every immoral practice which it may find the subjects of other states committing upon the high seas, but it does claim that where its lawful property interests are made the subject of direct attack by a practice in itself immoral and unjustifiable, it is justified in repelling the assault, and that its right so to act does not depend upon any international agreement. It is not claimed, as Lord Salisbury seems to suppose, that the fact that the United States are losers by "a certain course of proceeding" makes "that course an immoral one," but it is claimed that when a proceeding is already immoral and attacks and infringes the rights of the United States to such an extent as to despoil them of their lawfully acquired property, and property to which as has been shown above, Lord Salisbury's theory of wild animals to the contrary notwithstanding, they have an undoubted title, they are justified in taking such steps as are necessary to protect that property and to prevent that infringement.

The common law gives an application of this principle which presents in the relations of man to man a striking analogy to the present case, arising in the relations of nation to nation. It is a general principle of the common law that a private individual cannot maintain an action for a public or common nuisance. Such a nuisance must be proceeded against by the State; it is indictable, not actionable. But when a common nuisance is of such character that it causes direct damage to my property and constitutes a direct encroachment upon my rights, I may maintain an action in my own name for its abatement. Such is the position of the seal question. The Government of Great Britain by

undertaking to protect and countenance these depredations has permitted, if it has not originally set up, the existence of a common nuisance by which all the world suffers. And the fact that this injury is committed at my doors, against my property, and to my great damage and detriment, justifies me in maintaining that action which, in the case of what was solely a public nuisance, like the slave trade, would require the agreement of all the world.

It may be said that such an action is without precedent, and in support of this position many phrases may be quoted of statesmen and publicists, to the effect that except in case of piracy or international agreement no state can apprehend the vessels of another state upon the high seas, whatever acts they may have committed. That this application of the principle is without precedent in reference to seal poaching has no significance because, as has been freely admitted during the course of the published correspondence, seal poaching on any appreciable scale did not exist prior to the present controversy. That the protection of property at sea is not specifically stated by jurists as an exception to the general right of free navigation for merchant vessels is not surprising, seeing that it depends upon the great and fundamental law of self-preservation, which, as every jurist knows, may be an exception to any rule, and must be considered as an implied exception in the statement of every principle. Suppose that a British subject, or a colony of British subjects, should put the victims of epidemic disease upon a vessel and moor that vessel off the harbor of New York in the track of commerce proceeding to or from that port, but well outside of the so-called limit of territorial jurisdiction. Does anybody suppose that the United States would allow such a pest-ship to remain long in its position? Would it be prevented by any theory of the freedom of ocean navigation, or territoriality of the British vessel, or the inviolability of the British flag, from abating summarily this common nuisance which brought upon it specific injury? Would it wait to hunt up a precedent? A novel injury justifies a novel precedent. Or, finally, because of the general principle of non-interference with ships on the high seas, except in cases of piracy, would the law compel it to defer action until that action could be tied up in the red tape of an international compact?

As a matter of fact, however, the principle that the law of

self-preservation is an implied exception to the general rules governing international relations has been repeatedly laid down with distinctness by the highest authorities, especially in its application to maritime jurisdiction. It was stated by no less accomplished a jurist than Chief Justice Marshall, in a decision in the Supreme Court of the United States (Church vs. Hubbart, 2 Cranch, 234), in speaking of seizures made by a State, outside of the marine limit:

"Its power to secure itself from injury may certainly be exercised beyond the limits of its territory. Any attempt to violate the laws made to protect this right (Colonial commerce) is an injury to itself which it may prevent, and it has a right to use the means necessary for its prevention. These means do not appear to be limited within any certain marked boundaries, which remain the same at all times and in all situations. If they are such as are unnecessarily to vex and harass foreign lawful commerce, foreign nations will resist their exercise. If they are such as are reasonable and necessary to secure their laws from violation, they will be submitted to."

A similar doctrine was applied by the Supreme Court in a later case (Hudson vs. Guestier, 6 Cranch, 281), where a capture was made six leagues from the land.

An equally clear and emphatic statement of the doctrine was made in a debate in the House of Lords, in 1878, by the Lord Chancellor, upon a question arising out of the celebrated case of the Franconia. Speaking of the limits of territorial jurisdiction at sea, the Lord Chancellor said:

"It appears to be established as a matter of principle that there must be a zone. The only doubt was, as to how far our limits extend. The authorities were clear on this, that if three miles were not found sufficient for purpose of defence and protection, or if the nature of the trade or commerce in the zone required, there was a power in the country on the seaboard to extend the zone."

No higher or clearer authorities could be given to show that the ultimate test of the extent of maritime jurisdiction at sea is to be found in the necessities of self-preservation, and covering the protection and security of the state and its property, and the persons and property of its subjects.

Such is the question which the United States, strong in the justice of its cause, and controlled by that spirit of forbearance and adherence to order and law which should always govern in both domestic and international controversies, has now submitted to an impartial arbitration. It had no other alternative but to appeal to the God of battles.

B. F. TRACY.